STATE OF NORTH CAROLINA GUILFORD COUNTY BLUSKY RESTORATION CONTRACTORS, LLC, Plaintiff/Counterclaim Defendant, v. STEVEN W. BROWN, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff, and BLUSKY HOLDCO, LLC, Third-Party Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21CVS010032-400 **ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT** **[Public][1]**

1. **THIS MATTER** is before the Court on the 14 July 2023 filing of (1) *BluSky Restoration Contractors, LLC's and BluSky HoldCo, LLC's Motion for Summary Judgment as to Steven W. Brown's Counterclaims and Third-Party Complaint* ("BluSky's Motion"), (ECF No. 140 ["BluSky Mot."]), and (2) *Steven W. Brown's Motion for Partial Summary Judgment* ("Brown's Motion"; together, the "Motions"), (ECF No. 143 ["Brown Mot."]). Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), the Motions seek partial summary judgment on

[1] Recognizing that this Order and Opinion cites to and discusses the subject matter of documents that the Court has allowed to remain under seal in this action, and out of an abundance of caution, the Court filed this Opinion under seal on 24 July 2024. (*See* ECF No. 244.) The Court thereafter permitted the parties an opportunity to propose redactions to the public version of this document. On 7 August 2024, the parties' counsel notified the Court by email that all parties conferred and agreed to certain redactions. The parties proposed the redactions contained herein, and the Court finds that those redactions are narrowly and appropriately tailored. Accordingly, the Court now files the redacted, public version of this Order and Opinion.

BluSky Restoration Contractors, LLC and BluSky HoldCo, LLC's claims for breach of contract and misappropriation of trade secrets and Defendant's counterclaims for unjust enrichment and violations of the North Carolina Wage and Hour Act. (*See* BluSky Mot.; Brown Mot.)

2. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Akerman, LLP, by Bryan G. Scott, Adam L. Massaro, and Jasmine M. Pitt, for Plaintiff BluSky Restoration Contractors, LLC and Third-Party Defendant BluSky HoldCo, LLC.

Wagner Hicks, PLLC, by Sean C. Wagner, Tyler B. Peacock, Abbey M. Krysak, Jonathon D. Townsend, and Meagan L. Allen for Defendant Steven W. Brown.[2]

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of Defendant Steven W. Brown's ("Brown") employment at BluSky Restoration Contractors, LLC ("BluSky Restoration"). BluSky Restoration is a full-service restoration, renovation, environmental and roofing provider. It initiated this action contending that Brown left the company for a competitor in violation of various restrictive covenants, taking with him trade secret information and subsequently soliciting BluSky Restoration's employees to join the competing company. Brown thereafter claimed that BluSky Restoration was unjustly enriched by its use of Brown's licenses after he left the company and that he is entitled

[2] Following the filing of Brown's Motion, Abbey M. Krysak and Tyler B. Peacock were permitted to withdraw as counsel of record for Steven W. Brown on 5 October 2023 and 24 April 2024, respectively. (ECF Nos. 216, 238.) Jonathon D. Townsend appeared as counsel of record for Steven W. Brown on 3 April 2024. (ECF No. 235.)

to payment of a bonus earned prior to leaving BluSky Restoration for the competing company.

4. Following fulsome discovery, the Court must now consider the evidence of record to determine what claims, if any, should proceed to trial.

II. FACTUAL BACKGROUND

5. The Court does not make findings of fact when ruling on a motion for summary judgment. "[T]o provide context for its ruling, the court may state either those facts that it believes are not in material dispute or those facts on which a material dispute forecloses summary adjudication." *Ehmann v. Medflow, Inc.*, 2017 NCBC LEXIS 88, at *6 (N.C. Super. Ct. Sept. 26, 2017); *see also Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975) (encouraging the trial court to articulate a summary of the relevant evidence of record to provide context for the claims and motion(s)).

A. The Parties

6. BluSky Restoration and Third-Party Defendant BluSky HoldCo, LLC ("BluSky HoldCo"; with BluSky Restoration, the "BluSky Companies") are Delaware limited liability companies with their principal place of business in Colorado. (Second Am. Compl. ¶¶ 2–3, ECF No. 66 ["SAC"]; Brown's Answer to SAC ¶¶ 2–3, ECF No. 78 ["Answer to SAC"].) BluSky Restoration is registered to do business in this State, (SAC ¶ 2; Answer to SAC ¶ 2), and has office locations in roughly twenty-six states, (Aff. Drew Bisping ¶ 28, ECF Nos. 197.4, 202.3 ["Bisping Aff."]).

7. Brown is a resident of Greensboro, North Carolina. (SAC ¶ 4; Answer to SAC ¶ 4.) Brown has worked in the restoration industry for roughly twenty-nine years. (Aff. Brown Supp. Mot. Summ. J. ¶ 3, ECF No. 145 ["Brown MSJ Aff."].)

B. Brown's Employment with BluSky Restoration

1. Transition from Disaster One, Inc. to BluSky Restoration

8. Brown began working for Disaster One, Inc. ("Disaster One") on or about 8 August 1994. (Brown MSJ Aff. ¶ 4.) Disaster One, a restoration company in Greensboro, North Carolina, was acquired by BluSky Restoration in October 2017. (Brown MSJ Aff. ¶¶ 4, 7; Dep. Drew Bisping 67:22–25, ECF No. 197.11 ["Bisping Dep."]; *see also* SAC ¶¶ 20–21; Answer to SAC ¶¶ 20–21.)

9. On or about 1 October 2017, when BluSky Restoration acquired Disaster One, Brown became an employee of BluSky Restoration. (Brown MSJ Aff. ¶ 7; Bisping Dep. 69:1–8.) At the time, Brown led Disaster One's "large loss department," and he remained in that role during the "transitional period" after BluSky Restoration acquired the company. (*See* Bisping Dep. 69:9–70:25.) Brown ultimately transitioned into "a national leadership role for restoration," where he was primarily responsible for "coordinating resources" to ensure that BluSky Restoration had "the right personnel, equipment, [and] subcontractor response to [large, complex loss] situations."[3] (Bisping Dep. 71:4–12, 74:2–22.)

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[3] BluSky Restoration is in the business of providing "general contracting and consulting services in the restoration of multi-family, residential, commercial, industrial and religious facilities in response to hurricanes, tornadoes, floods, ice storms, fires and water-related emergencies, specializing in water damage, fire damage, storm damage, smoke and odor damage, certified mold remediation and contents restoration[.]" (Confidentiality, Noncompetition & Nonsolicitation Agt. 1, ECF No. 66.1.)

10. On 26 September 2017, Brown signed a two-page employment agreement with BluSky Restoration, which set forth his compensation and benefits (the "Employment Agreement"). (ECF No. 141.5 ["Empl. Agt."].) The Employment Agreement provided that as National Director of Restoration, Brown's annual compensation would be [redacted] with an annual bonus calculated as follows: "5% of profit over 5% of sales and additional 2.5% of the profit over 10% of sales for LLWM department." (Empl. Agt. 1.) Further, the Employment Agreement provided that Brown

> must be employed by BluSky on the day a bonus is paid in order to receive the bonus. . . . If BluSky terminates your employment for reasons other than Cause (as defined in Confidentiality, Noncompetition and Nonsolicitation Agreement dated October 2, 2017), you will vest in your bonus. If BluSky terminates your employment for reasons of Cause, of [sic] if you elect to sever your employment with BluSky, there is no vesting in your bonus.

(Empl. Agt. 1.) The Employment Agreement does not state the annual date that bonuses become payable. (*See* Empl. Agt.)

11. The record demonstrates that part of Brown's role at BluSky Restoration involved serving as its "qualifying agent" in states where Brown had licenses for general contracting, mold remediation, and asbestos abatement, which enabled BluSky Restoration to perform that kind of work in various states.[4] (Brown MSJ

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[4] In the construction and contracting business, many states require a company to associate with an individual carrying an appropriate construction or contractor's license. Those individuals are referred to as the company's "qualifier" or "qualifying agent." (Brown's Answer & Countercl. ¶ 19, ECF No. 22 ["Brown's Countercl."]; Answer Def.'s Countercl. & Third-Party Countercl. ¶ 19, ECF No. 53 ["HoldCo Countercl."].) And, because "[a]sbestos work is highly regulated[,]" proper state licensing is required to perform asbestos remediation work. (Report of Richard Driscoll 13, ECF No. 173 ["Driscoll Rep."].)

Aff. ¶ 8.) The BluSky Companies were required to have a qualifier with an up-to-date license in order to perform, for example, asbestos work in any given state. (Dep. Steven W. Brown 433:17–34:18, ECF Nos. 141.15, 181.1 ["Brown Dep."].)[5] Thus, if the BluSky Companies did not have "a qualifier with an appropriate license" in a state, then they could not lawfully perform regulated work in that state.[6] (Brown Dep. 433:24–34:18.)

12. The record also demonstrates that BluSky Restoration relied on Brown's licenses while he was employed by it, including his asbestos supervisor licenses, mold remediation licenses, building contractor licenses, and general contractor qualifying agent licenses. (Brown Countercl. Ex. A, ECF No. 22.1; HoldCo Countercl. ¶ 23 (the "BluSky [Companies] admit[] that BluSky Restoration sent Brown a list of his licenses [it used] in late November of 2021, a copy of which is attached as Exhibit A to the Counterclaim and Third-Party Complaint").) Brown held a variety of these licenses in Alabama, Arkansas, Florida, Georgia, Hawaii, Iowa, Louisiana, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia, and the District of Columbia. (Brown Countercl. Ex. A, ECF No. 22.1; HoldCo Countercl. ¶ 23.)

It is undisputed that "Brown served as a qualifier for certain BluSky Restoration licenses." (HoldCo Countercl. ¶ 22.)

[5] Brown's deposition testimony was filed by the parties in fragments and appears at ECF Nos. 141.15, 148, 181.1, 191.1, 197.6, and 208.1. For ease of reference, the Court does not restate each ECF No. where the testimony cited is located, and instead cites to this testimony throughout the Opinion as: (Brown Dep. [ ]:[ ]).

[6] "[R]egulated asbestos work" is a phrase used throughout the record to refer to asbestos work that requires a permit. (*See* BluSky Restoration Objs. & Resp. to ROGs and RFPs 29, ECF No. 151 ["BluSky Resp. ROGs & RFPs"].) The same would be true of regulated mold projects. (*See* BluSky Resp. ROGs & RFPs 29–30.)

13. Shortly after he became an employee of BluSky Restoration, it is undisputed that Brown also executed the Confidentiality, Noncompetition and Nonsolicitation Agreement (the "2017 Agreement"), dated 1 October 2017. (ECF No. 66.1 ["2017 Agt."]; *see* Answer to SAC ¶¶ 21–23.)

14. The 2017 Agreement, between Brown, BluSky Restoration, and BluSky Restoration Holdings, LLC, provides that, in exchange for compensation and employment with BluSky Restoration, Brown agreed to be bound by the terms of the 2017 Agreement. (2017 Agt. 1.) The 2017 Agreement sets forth various restrictive covenants, including Nondisclosure, Non-Competition, and Non-Solicitation terms. (*See* 2017 Agt. 1–4.) The 2017 Agreement has a choice of law provision, designating Delaware law as applicable for determination of "issues and questions concerning the construction, validity, enforcement and interpretation of" it. (2017 Agt. 8.)

2. BluSky Restoration's Work in the Industry

15. By way of background, BluSky Restoration offers services for "both residential and commercial property[,]" performing work "on approximately 30,000 projects" annually. (Bisping Aff. ¶¶ 10–11.) Its "customer-base" includes commercial work for multi-family, condominium and apartment communities and buildings, universities and schools, hotels, and senior living communities, among others. (Bisping Aff. ¶ 12.) In 2021, it had roughly [redacted] national accounts, meaning customers with properties or potential business in multiple states, which generated more than $[redacted] in revenue. (Bisping Aff. ¶ 13.) BluSky Restoration also works for national property managers and international property damage consulting firms.

(Bisping Aff. ¶¶ 19, 23.) BluSky Restoration views its business as geographically unlimited, and its services are advertised nationally. (Bisping Aff. ¶¶ 25, 31.)

16. The record demonstrates that BluSky Restoration, at any given time, "typically provides services in over 40 states," but it historically has not performed work in every single state. (Michael Renfroe 30(b)(6) Dep. 7:13–8:2, ECF No. 150 ["Renfroe 30(b)(6) Dep."].)

3. Brown's Access to Allegedly Confidential Information

17. The BluSky Companies allege that, as a BluSky Restoration employee, Brown had access to substantial confidential, proprietary, and trade secret information, including sensitive technical data, strategic information about competitors, and other confidential business and financial information. (*See* SAC ¶¶ 56–58.)

18. The record demonstrates that BluSky Restoration's general practice was to require employees with access to this type of information to execute confidentiality agreements. (Renfroe 30(b)(6) Dep. 26:3–13; *see* BluSky 30(b)(6) Dep. Wyatt Cox 142:2–43:10, ECF No. 197.1 ["Cox 30(b)(6) Dep."].)[7] Since at least 2019, it also required all employees to sign an employee handbook acknowledgment, within the first thirty days of their employment. (Renfroe 30(b)(6) Dep. 26:14–27:18, 28:20–24.) The employee handbook acknowledgment is a one-page document that requires an

[7] The deposition testimony of Wyatt Cox, which was taken pursuant to Rule 30(b)(6), was filed by the parties in fragments and appears at ECF Nos. 141.16, 146, 195.3, and 197.1. For ease of reference, the Court does not restate each ECF No. where the testimony cited is located, and instead cites to this testimony throughout the Opinion as: (Cox 30(b)(6) Dep. [ ]:[ ]).

employee to affirm that they received the employee handbook, which contains "various company policies, procedures, and employee benefits[,]" and that the employee agrees to read the employee handbook. (*See* ECF Nos. 197.20–.21 (providing two examples of signed handbook acknowledgements from 2021).)

19. Of particular concern to the BluSky Companies' claims regarding breach of confidentiality are two documents: the National Catastrophe Vendor List ("CAT Vendor List"), (ECF No. 152 ["CAT List"]), and the Employee Information List, (ECF No. 153 ["EE Info"]).

20. The CAT Vendor List is a compilation of national vendors that "provides direct contact to individuals in the companies . . . that are not available publicly." (Dep. Neil Eisgruber 50:7–17, ECF No. 158 ["Eisgruber Dep."].)[8] The CAT Vendor List contains the direct contact information for individuals who provide services during catastrophic events, including cell phone numbers, as well as information regarding each vendor's forte—i.e., providing "porta-potties," portable offices, skilled general construction labor, electricians, roofing, and more. (CAT List; *see* Eisgruber Dep. 50:7–51:14; Dep. Mike Erekson 116:23–17:1, ECF No. 197.9 ["Erekson Dep."].) The BluSky Companies' expert, Neil Eisgruber ("Eisgruber"), testified that there is value in the companies having this information in "a single consolidated place" and in "having a direct contact instead of calling a general line." (Eisgruber Dep. 51:4–14.)

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[8] The deposition testimony of Neil Eisgruber was similarly filed in fragments and appears at ECF Nos. 158, 197.14, 202.5, 211.3, 234.2. For ease of reference, the Court does not restate each ECF No. where the testimony cited is located, and instead cites to this testimony throughout the Opinion as: (Eisgruber Dep. [ ]:[ ]).

21. Brown testified that he contributed to the CAT Vendor List and that he has "a relationship with many of the vendors listed [therein,] having personally worked with many of them throughout his career." (Brown MSJ Aff. ¶¶ 23, 26.)

22. The Employee Information List is a spreadsheet of BluSky Restoration "project managers and the ratings for those project managers[,]" referencing that employee's job performance. (Eisgruber Dep. 119:3–10.) In relevant part, the spreadsheet rates project supervisors on a scale of one to ten as to their performance on twenty specific skills, with one being the worst score and ten being the best. (*See* EE Info.) Brown participated in putting together this spreadsheet and testified that the purpose of obtaining the information was to get feedback from others at BluSky Restoration about the restoration supervisors and project managers to "identify training needs or learning opportunities[,]" and to identify what teams of people might work well together. (Brown Dep. 135:12–36:23.) The spreadsheet was designed to allow restoration supervisors and project managers to score each other through a confidential process. (Brown Dep. 137:19–38:15.) Brown summarized the results of each employee's scores, combining everything into one spreadsheet, which he shared with at least two other individuals working at BluSky Restoration. (Brown Dep. 138:22–39:25.) The record demonstrates that the information on the Employee Information List was gathered in August 2021. (*See* ECF No. 197.18 (email communication from Brown on 11 August 2021 requesting that the skills assessment be completed by 20 August 2021).)

C. Other Contracts at Issue: the LP Agreement and LLC Agreement

23. It is undisputed that BluSky Management Incentive, LP ("BMI"), was formed on 26 July 2018. (HoldCo Countercl. ¶ 24 ("BluSky admits that a certificate of limited partnership for BluSky Management Incentive, LP was filed with the Delaware Secretary of State on July 26, 2018[.]").) BMI was allegedly formed as part of a profit-sharing program for certain BluSky Restoration employees by which Brown became a limited partner of BMI. (*See* SAC ¶¶ 36, 40, 56; Answer to SAC ¶¶ 36, 40, 56.)

24. The parties agree that on 14 August 2018, BluSky HoldCo, BMI, and various individuals entered into the Limited Partnership Agreement of BMI (the "LP Agreement"). (SAC ¶ 34; Answer to SAC ¶ 34; *see* LP Agreement, ECF No. 25 ["LP Agt."].) It is also undisputed that Brown did not sign the LP Agreement. (Cox Dep. 19:8–16.) Rather, Brown signed a Joinder to it. (Cox 30(b)(6) Dep. 20:12–20; *see* Joinder, ECF No. 66.2 ["Joinder"]; LP Agt. § 2.2(b).)

25. The Joinder, dated 14 September 2018, provides that Brown, as a new partner, acknowledges receipt of the BMI "Partnership Agreement and agrees to become a party thereto and to be bound thereby. In particular and without limitation, the New Partner[, i.e. Brown,] assumes all of the rights and obligations of a Management Limited Partner as set forth in the Partnership Agreement." (Joinder 1; *see* Cox 30(b)(6) Dep. 20:16–22.) As a result, Brown received 153.83 Class B Units in BMI. (Cox 30(b)(6) Dep. 57:18–21.)

26. The LP Agreement provides, in relevant part:

> **Section 12.10 Restrictive Covenants.**
> (a) Confidentiality. Each of the Limited Partners (other than BluSky HoldCo) hereby agrees that throughout the term of this Agreement it shall keep (and shall cause its directors, officers, general and limited partners, employees, representatives and outside advisors and its Affiliates to keep) all non-public information, including but not limited to, business or trade secrets (under applicable trade secrets or other law), price lists, methods, formulas, know-how, customer and supplier lists, distributor lists, product costs, marketing plans, research and development and financial information, received by such Limited Partner solely by reason of such Limited Partner's status as a limited partner of the Partnership (including any such information received prior to the date hereof) confidential . . . .
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> (b) Non-Solicitation. During the Restricted Period, no Limited Partner (other than BluSky HoldCo) shall directly or indirectly through another Person (other than on behalf of the [sic] (other than BluSky HoldCo) and its Subsidiaries) (i) induce or attempt to induce any employee, officer or independent contractor of BluSky HoldCo or any of its Subsidiaries . . . to leave the employ of, or terminate its affiliation with, BluSky HoldCo or such Subsidiary, or in any way interfere with the relationship between BluSky HoldCo or any of its Subsidiaries and any such Person, (ii) hire or seek any business affiliation with any Person who was an employee, officer or independent contractor of BluSky HoldCo or any of its Subsidiaries within one (1) year after such Person ceased to be an employee, officer or independent contractor of BluSky HoldCo or any of its Subsidiaries . . ., or (iii) induce or attempt to induce any Person who is . . . a customer, supplier, licensee or other business relation of BluSky HoldCo or any of its Subsidiaries to cease doing business with BluSky HoldCo or such Subsidiary, reduce the business that it does with BluSky HoldCo or such Subsidiary or in any way interfere with the relationship between any such customer, supplier, licensee or business relation and BluSky HoldCo or any such Subsidiaries . . . .
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> (c) Non-Competition. During the Restricted Period, no Management Limited Partner shall directly or indirectly, either for such Management Limited Partner or for any other Person, anywhere within the "Restricted Territory" (as defined below), (i) own any interest in,

> manage, control, or participate in, or (b) in each case in a competitive capacity, consult with, render services for, serve as an agent or representative for, finance or in any other manner engage in any business with, any Person . . . that engages in the Business in the Restricted Territory, or that otherwise competes with the Business in the Restricted Territory For purposes of this Agreement, "Business" means any the business of providing project management services relating to restoration, renovation, environmental, and roofing to commercial and multifamily properties, as engaged in by BluSky HoldCo and its Subsidiaries during any time when such Management Limited Partner was employed by BluSky HoldCo or any of its Subsidiaries[.]

(LP Agt. §§ 12.10(a)–(c).)

27. "Restricted Territory," means the United States of America and "any state, province or territory in any other country, in which BluSky HoldCo or any of its Subsidiaries engages in the Business or actively plans to engage in the Business as of the date of the challenged activity" or the date of the limited partner's termination. (LP Agt. § 12.10(c).) Further, "Restricted Period" means "a period of time from the date hereof until the date that is two (2) years after the termination of employment (for any reason) of such Limited Partner." (LP Agt. Ex. B-8.)

28. The LP Agreement and its terms are governed by Delaware substantive law. (LP Agt. § 12.6.)

29. On 14 August 2018, the same day the LP Agreement was executed, the Amended and Restated Limited Liability Company Agreement of BluSky HoldCo (the "LLC Agreement") was executed. (*See* ECF No. 54.3 ["LLC Agt."].) The LLC Agreement contains restrictive covenants that are substantially similar to those quoted from the LP Agreement, including the Confidentiality, Non-Solicitation, and Non-Competition covenants. (*See* LLC Agt. §§ 13.17(a)–(c).) Brown was listed as a

Member in Exhibit A to the LLC Agreement, but not a Managing Member in Exhibit F. (*See* LLC Agt. Exs. A, F.) However, Brown was a limited partner in BMI, as he held 153.83 Class B Units in it. (Cox 30(b)(6) Dep. 57:18–21.)

30. The evidence demonstrates that Brown did not sign the LLC Agreement or a joinder thereto, but it is the BluSky Companies' position that Brown was nevertheless bound by the restrictive covenants therein by virtue of the LP Agreement, contending that "any signatory or limited partner or member of the LP [A]greement would be bound by the LLC [A]greement." (Cox 30(b)(6) Dep. 38:13–40:5; *see* LLC Agt. (evidencing that Brown did not sign).)

D. The BMI Merger & Brown's Resignation from BluSky Restoration

1. Brown's Offer Letter from Sasser Companies, LLC

31. The record demonstrates that Sasser Companies, LLC d/b/a Sasser Restoration ("Sasser") is a North Carolina limited liability company engaged in restoration work. (Brown Aff. Supp. TRO Ex. 1 at 2, ECF No. 95 ["Brown TRO Aff."]; Sasser 30(b)(6) Dep. of Sebastian Williams & Houston Summers 95:22, ECF Nos. 197.15, 202.6, 234.3 ["Sasser 30(b)(6) Dep."].) It is undisputed that Sasser is a competitor of BluSky Restoration. (Brown's Countercl. ¶ 117 ("It is further admitted that Sasser is a direct competitor of BluSky Contractors."); *see* Sasser 30(b)(6) Dep. 90:7–91:7; Dep. Miguel Figueroa, III 45:20–21, ECF No. 197.13 (stating that Sasser competes with "[a]ll the restoration companies in the nation" for business).)

32. On 8 July 2021, Brown received an email from Miguel A. Figueroa III ("Figueroa"), Sasser's then-COO, offering Brown employment at Sasser as its Vice

President of Operations. (Ex. 24, ECF Nos. 197.24, 202.9 ["Sasser Offer Ltr."].) The offer letter provided several terms, including that Brown's gross annual salary would be [redacted], with certain equity opportunities, and that Brown would receive equipment, including a vehicle, vehicle insurance, a gas card, an expense card, a cellphone, computer, and an iPad. (*See* Sasser Offer Ltr.)

33. The record demonstrates that Brown signed and returned the Sasser offer letter on 15 July 2021. (Brown MSJ Aff. ¶ 15; *see* Sasser Offer Ltr.)

2. The Merger and Brown's Surrender of his BMI Units

34. On 2 September 2021, BluSky HoldCo entered into the Agreement and Plan of Merger (the "Merger Agreement") with KPSky Acquisition, Inc. ("KPSky Acquisition") and certain other parties, pursuant to which, among other things, KPSky Acquisition was to merge with and into BluSky HoldCo, with BluSky HoldCo continuing as the surviving entity (the "Merger). (*See* Agt. & Merger 15–182, ECF No. 36 ["Merger Agt."].) The Merger effectuated, in relevant part, the surrender of all outstanding membership units in BMI. (Letter of Transmittal 1–15, ECF No. 36 ["LOT"]; Cert. Merger, ECF No. 22.7.)

35. Following the Merger, a Certificate of Cancellation of BMI, the limited partnership, was filed on 19 October 2021. (ECF No. 22.8; *see also* Cox 30(b)(6) Dep. 22:4–23:2.) BluSky Restoration remained a subsidiary of BluSky HoldCo.

36. To surrender his membership units in BMI, the record demonstrates that Brown executed the Letter of Transmittal and returned the document to BluSky Restoration by email on 15 October 2021. (ECF No. 149 (email communications

evidencing Brown's return of the transmittal document); *see also* Brown Dep. 336:15–37:17.) Brown received a [redacted] payment in exchange for the surrender of his units. (BluSky's Resp. Brown's First ROGs 7, ECF No. 154; Brown Dep. 76:1–3, 149:22–24.)

37. Following the Merger, the LLC Agreement of BluSky HoldCo was amended and restated, effective 20 October 2021 (the "Amended LLC Agreement"). (Cox 30(b)(6) Dep. 52:1–22; *see* Am. Restated LLC Agt., ECF No. 79.2 ["Am. LLC Agt."].) The Amended LLC Agreement provides that it amends and restates the LLC Agreement "in its entirety on the terms and subject to the conditions set forth herein[.]" (Am. LLC Agt. 1.) The Amended LLC Agreement does not contain restrictive covenants and Brown was not a signatory to it. (*See* Am. LLC Agt.)

3. Brown's Resignation from BluSky Restoration

38. On 25 October 2021, Brown submitted his resignation letter to BluSky Restoration. (Brown MSJ Aff. ¶¶ 10, 29.) He continued to work at BluSky Restoration until 19 November 2021. (Brown MSJ Aff. ¶ 12.)

39. The record indicates that prior to Brown's last day, but after he submitted his resignation letter, Brown was negotiating post-resignation continued part-time employment with BluSky Restoration. (*See* Cox 30(b)(6) Dep. 95:5–12; ECF No. 141.10 ["Negot'n Email"] (draft terms for part-time employment from Wyatt Cox to Brown).)

i. November 2021 Conversations with Figueroa

40. Brown was also in conversation with Figueroa as early as 5 November 2021. (ECF Nos. 197.22, 202.7 ["BluSky Ex. 22"] (providing Brown's text messages with Figueroa between 5 November to 25 December 2021).) In fact, on 5 November 2021, the pair communicated about Brown's first day at Sasser being 15 November 2021 and adding Brown as a qualifier for it. (BluSky Ex. 22 at 1–4.)

41. On 10 November 2021, Figueroa texted Brown, "Ps we may need Paul sooner than expected. . . ! Do you think he could possibly do it? I can give you more info tomorrow afternoon." (BluSky Ex. 22 at 6 (ellipsis in original).) Brown responded "Yes[.]" (BluSky Ex. 22 at 7.) That same day, Brown texted Figueroa, stating: "Also heard from Paul via Russell [Wise] that Hedrick is spreading the word that I'm coming[,]" and "Russ and Paul are two I trust completely[.]" (BluSky Ex. 22 at 8–10.) Figueroa stated, "I will speak to both of them tomorrow." (BluSky Ex. 22 at 10.) Brown also texted Figueroa, "Regardless word will spread quickly as soon as I'm In the building....we just need to be prepared for that[.] Let's chat tomorrow about another distraction I'm planning[.]" (BluSky Ex. 22 at 11 (ellipsis in original).)

42. On 16 November 2021, Brown and Figueroa again communicated by text message. It appears that Brown sent Figueroa a document of some kind by email, to which Figueroa stated: "Wow, definitely sending this to our Attorney.... If you are ok with that. I think you are holding some cards!!!" (BluSky Ex. 22 at 18–20 (ellipsis in original).) Brown stated "Sure[,]" and "Can I call you later[?]" (BluSky Ex. 22 at 20.) Figueroa wrote: "Yes sir. Whatever you do don't sign the agreement. We have some

additional information for you that we can talk about tomorrow. The attorney said he can give you some help to understand in [sic] the proper response." (BluSky Ex. 22 at 21.)

43. The next day, the pair communicated again, with Figueroa inquiring, "[a]nything on the Employment agreement?" (BluSky Ex. 22 at 25.) Brown responded, "Kimberly said she would send." (BluSky Ex. 22 at 25.)

ii. Brown's Last Day and Document Transfers

44. Brown's last day at BluSky Restoration was 19 November 2021. (Brown MSJ Aff. ¶ 12.) In connection with his resignation, BluSky Restoration provided Brown with a Separation from BluSky Letter (the "Separation Letter"), dated 19 November 2021, which set forth specific steps for Brown to take or otherwise comply with in concluding his employment. (ECF No. 141.9 ["Separation Ltr."].) The Separation Letter had an Acknowledgement of Receipt of Company Property (the "Separation Acknowledgement") attached, which required Brown to certify that he did not have in his possession and had returned all company or client materials or property and any confidential information, "documents which evidence, refer or relate to Confidential Information or Trade Secrets[.]" (Separation Ltr. 1–2.) Brown signed the Separation Acknowledgement the same day. (Separation Ltr. 4.)

45. According to a forensic analysis of Brown's BluSky Restoration computer, Brown connected three USB mass storage devices to his computer on 19 November 2021. (Aff. Robert B. Fried 2–3, ECF No. 197.5 ["Fried Rep."].) Brown's internet search history from that day demonstrates that "Brown performed various

Internet searches on how to back up the email client, Microsoft Outlook, or the contents of the Brown BluSky Computer or Brown BluSky Phone." (Fried Rep. 3.) The searches included: "Total Backup of Your Entire Computer – Zinstall Fullback"; and "how to back up outlook." (Fried Rep. 5–6.)

46. Between 6:39 AM and 6:57 AM on 19 November, approximately 2,593 files were copied onto a USB device from the Brown BluSky Computer. (Fried Rep. 7.) Further, at "3:33 PM, approximately 1,862 files were deleted from the Brown BluSky Computer." (Fried Rep. 7.)

iii. Continued Negotiations on Part-Time Employment

47. Brown testified that he signed a second offer letter from Sasser in November 2021, but that he considered both the July 2021 and November 2021 offer letters to be non-binding. (Brown MSJ Aff. ¶¶ 15–17; *see also* BluSky Ex. 22 at 43.) The second Sasser offer letter appears to temporally overlap with Brown's negotiations for part-time employment with BluSky Restoration.

48. Following Brown's last day at BluSky Restoration, the record demonstrates that Brown continued to negotiate part-time employment with Wyatt Cox ("Cox"), the company's attorney. (Negot'n Email; ECF Nos. 141.11–.13 (providing Brown and Cox's email communication between 20 November and 24 November 2021).)

49. The negotiations included discussions regarding whether Brown (1) would permit BluSky Restoration's continued use of his various licenses while it completed a "licensing transition," and (2) would complete his work as an expert for BluSky Restoration in ongoing litigation. (Negot'n Email; Cox 30(b)(6) Dep. 93:17–94:14

(discussing why BluSky Restoration wanted Brown to stay on part-time).) In return, BluSky Restoration would consider Brown's "annual bonus earned and payable[,]" meaning "the full bonus would be paid some time in February [2022] when bonuses are paid company-wide." (Negot'n Email; *see also* Brown Dep. 185:8–86:3.) Brown would also receive [redacted] per week in compensation for BluSky Restoration's use of his licenses, as well as [redacted] per hour for his expert consultation work. (Negot'n Email; Brown Dep. 182:10–83:3, 184:20–85:7.)

50. The record demonstrates that the parties never reached an agreement, despite their negotiations. (Brown Dep. 182:7–9, 186:2–3; Cox 30(b)(6) Dep. 108:2–10 (agreeing that by 6 December 2021, BluSky Restoration informed Brown's attorney "that BluSky was no longer interested in rehiring" Brown).) Brown testified that, after 19 November 2021, he did not authorize BluSky Restoration to use any of his licenses or qualifier statuses, including related to mold and asbestos remediation projects. (Brown MSJ Aff. ¶ 14.)

E. Brown's Employment at Sasser & Developments During Litigation

51. Brown testified that his first day at Sasser was 6 December 2021, the same day that BluSky Restoration informed him that they were no longer interested in continuing negotiations for part-time employment. (Brown MSJ Aff. ¶¶ 13, 18.)

52. The forensic review of Brown's USB devices, discussed above, demonstrated that on Brown's first day at Sasser he connected two USB Drives to his Sasser computer, each of which contained files copied from his BluSky Restoration computer. (Fried Rep. 7.) The forensic review also demonstrated that "[t]hose files include the

BluSky 'National Project Manager Skills,' 'National Supervisors Skills,' 'Copy of Final 2021 Merit Increase,' 'National Revenue,' and 'CAT Vendor list 5.19.20_Update not complete' . . . ." (Fried Rep. 7.)

1. Paul Miller's Resignation from BluSky Restoration

53. On 22 November 2021, Figueroa texted Brown, "QQ.... Where was Paul with Salary?" (BluSky Ex. 22 at 35 (ellipsis in original).) Brown wrote back, "Like [redacted] .... they offered him [redacted] plus bonus[.] But he stupid chance to make [redacted] in bonus if he stayed pm[.]" (BluSky Ex. 22 at 35 (ellipsis in original).) On 30 November 2021, Figueroa asked Brown, "[w]hat's Paul [sic] current title?" to which Brown responded, "National Restoration Project Manager[.]" (BluSky Ex. 22 at 43.) Figueroa asked, "[w]hat do you think is a good title for him? Same?" (BluSky Ex. 22 at 44.) Brown responded, "Senior Project Manager[.] Hopefully we can transition him to a higher role and title[.]" (BluSky Ex. 22 at 44.) When Figueroa asked what that higher title could be, Brown wrote: "director of restoration[.]" (BluSky Ex. 22 at 44–45.)

54. The BluSky Companies allege that Brown and Figueroa's text message references to "Paul" are discussions to solicit Paul Miller ("Miller") to leave BluSky Restoration for Sasser. (HoldCo Countercl. ¶¶ 97–99; SAC ¶¶ 90–91.) The record demonstrates that Miller worked as a national restoration project manager at BluSky Restoration. (Renfroe Dep. 67:11–16; *see* EE Info.) Further, Miller testified that his nickname is "The General," and that he has had that nickname since a project at

Camp Lejeune in 2020 or 2021. (Dep. Paul Miller 54:5–22, ECF No. 197.8 ["Miller Dep."].)

55. Brown concedes that he and Figueroa were discussing Miller but denies that the conversations "amounted to any improper solicitation of Miller." (Brown's Answer to HoldCo Countercl. ¶ 98, ECF No. 67.)

56. On 30 November 2021, Brown wrote to Figueroa, "you made an offer to the general yet[?]" (BluSky Ex. 22 at 39.) Figueroa wrote back, "[t]omorrow afternoon, what's up?" and Brown responded, "[n]othing...just curious[.]" (BluSky Ex. 22 at 40 (ellipsis in original).) It appears from Brown and Figueroa's messages that Sasser sent an offer letter to Miller on or about 1 December 2021, around the same time that BluSky Restoration was negotiating with Miller.[9] (*See* BluSky Ex. 22 at 46–47.)

57. Brown testified that (1) at no time prior to 25 October 2021 did he tell Miller that he intended to resign from BluSky Restoration, and (2) at no time prior to 6 December 2021 did he tell Miller that he planned to join Sasser. (Brown MSJ Aff. ¶¶ 30–31.) Brown also testified that he "never attempted to influence Mr. Miller to leave his employment" with BluSky Restoration. (Brown MSJ Aff. ¶ 32.) On 2 December 2021, Brown sent a text message to Miller stating: "Well how was that other offer," to which Miller responded, "[v]ery good. I start 1/3[.]" (BluSky Ex. 23 at 6–7, ECF Nos. 197.23, 202.8.)

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[9] The record demonstrates that Miller was negotiating with Sasser and BluSky Restoration around the same time but does not indicate *why* Miller was negotiating with BluSky Restoration at the time. (*See* Miller Dep. 127:1–22.)

58. The record demonstrates that Miller resigned from the BluSky Companies effective 17 December 2021. (Aff. Kimberly Cleveland ¶ 18, Ex. F, ECF Nos. 197.3, 202.2 ["Cleveland Aff."].) Miller signed his Employee Acknowledgement of Separation that same day. (Cleveland Aff. Ex. F at 2; *see* Miller Dep. 52:7–16.) This document contained substantially similar language to that in Brown's Separation Letter.[10] (*Compare* Cleveland Aff. Ex. F, *with* Separation Ltr.)

59. The evidence demonstrates that Miller now works at Sasser. (*See* Eisgruber Dep. 142:18–23; Miller Dep. 127:7–22.) The record does not appear to contain Miller's Sasser start date or the terms of his employment there.

2. BluSky Restoration's use of Brown's Qualifier Status

60. As discussed, Brown served as a qualifier for BluSky Restoration, which allowed BluSky Restoration to perform regulated work in various states. (*See supra* ¶¶ 11–12.)

61. Brown testified that in "late-2021 and early-2022," he "undertook efforts to notify various state agencies of [his] separation from BluSky Contractors and request that the agencies remove [his] name from any licenses or qualifier materials affiliated

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[10] The record demonstrates that, like Brown, Miller had access to some of BluSky Restoration's confidential information. For example, Miller testified that he assisted in creating the Employee Information List by preparing a ranking of supervisors, which the BluSky Companies contend is trade secret information. (Miller Dep. 42:24–43:18.)

The BluSky Companies were unable to locate a nondisclosure agreement, employee handbook acknowledgment, or confidentiality agreement executed by Miller. (Renfroe 30(b)(6) Dep. 30:23-31:10.) However, Miller testified that he did sign an employee handbook acknowledgment, or at least recalls likely doing so. (Miller Dep. 143:1–9.) Miller did not recall signing any kind of confidentiality agreement or nondisclosure agreement. (Miller Dep. 143:10–18.)

with BluSky Contractors." (Brown TRO Aff. ¶ 5.) This included the 22 December 2021 submission of a "notarized letter to the Florida Department of Business and Professional Regulation[,]" whereby Brown indicated that he no longer worked at BluSky Restoration and requested his name be removed "from any licenses or qualifier materials affiliated with BluSky" Restoration. (Brown TRO Aff. ¶ 6.)

i. Florida

62. During the pendency of this litigation, in or around October 2022, Brown became aware that he was still listed as BluSky Restoration's "Asbestos Financial Officer" and "Asbestos Contractor" in the State of Florida. (Brown TRO Aff. ¶¶ 8–10.) Around November or December 2022, Brown discovered that BluSky Restoration was performing asbestos-related work in Florida using his license numbers without his consent. (Brown TRO Aff. ¶¶ 20–21, 44; *see also* Dep. Agustin Rodriguez 105:1–17, ECF No. 160 ["Rodriquez Dep."].)

63. There are four asbestos-related projects where BluSky Restoration allegedly relied on Brown's license to self-perform regulated asbestos work in Florida: (1) Mirador at Woodside Apartments in Kissimmee, Florida for asbestos removal and renovation from 28 October to 31 December 2022 (the "Mirador Project"), (ECF No. 162); (2) Valencia on the Gulf in Venice, Florida for drywall ceiling removal from 3 November to 2 December 2024 (the "Valencia Project"), (ECF No. 161); (3) Volusia Fire Station 12 in Port Orange, Florida for asbestos removal and renovation from 7 November to 10 November 2022 (the "Volusia Project"), (Brown TRO Aff. ¶ 24, Ex. 9; *see* ECF No. 167); and (4) Helios Apartments in Miami Beach, Florida for

asbestos removal from 9 August to 18 August 2022 (the "Helios Project"), (ECF No. 165).

64. Brown's Florida Asbestos Contractor license number CJC1154389, and Asbestos Financial Officer license number FO351, (*see* Brown TRO Aff. ¶¶ 7, 10, Ex. 3 at 3–4), do not appear on the Notice of Demolition or Asbestos Renovation forms that BluSky Restoration submitted to the State of Florida, (*see* ECF Nos. 161–62, 165; Brown TRO Aff. Ex. 9).

65. BluSky Restoration, through its Vice President of Environmental Services Agustin Rodriguez ("Rodriguez"), admits that it "self-performed regulated asbestos abatement work" on the above-described four projects in Florida from 19 November 2021 to 8 December 2022.[11] (Decl. Agustin Rodriguez ¶¶ 4–5, ECF No. 102.1 ["Rodriguez Decl."].) Rodriguez testified that "any asbestos-related work by BluSky employees was performed in conjunction with properly credentialed, independent Florida Asbestos Consultants (*i.e.* industrial hygienists) retained by the owners." (Rodriguez Decl. ¶ 9 (italics in original).)

66. On 6 December 2022, BluSky Restoration issued and implemented a stop work order on all regulated asbestos work in Florida, impacting the Mirador Project and Valencia Project which were ongoing at the time. (Rodriguez Decl. ¶¶ 6, 11–12, Ex. A.)

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[11] Rodriguez also testified that each of these projects "was initially bid and contracted under BluSky's General Contractor license, and none were originally bid or begun as asbestos-related work." (Rodriguez Decl. ¶ 7.) Rather, "onsite testing by third-party testing companies (after contracting) revealed the presence of asbestos-containing materials at the project site." (Rodriguez Decl. ¶ 7.)

67. On 3 February 2023, Brown and his counsel called an investigator at the Florida Department of Business and Professional Regulation (the "FDBPR"), who informed them that BluSky Restoration "was licensed to perform asbestos work within Florida based on license number CJC1154389," and that BluSky Restoration "would not have been licensed to perform asbestos work" in the state absent Brown's license. (Aff. Steven W. Brown Opp'n BluSky Mot. ¶¶ 2, 4, ECF No. 195.1 ["Brown Opp'n Aff."].)

ii. Louisiana

68. Brown also alleges that BluSky Restoration was using his license to perform asbestos work in the State of Louisiana on five asbestos-related projects: (1) Ridgefield Apartments in Marrero, Louisiana from 13 October 2021 to 9 March 2022 (the "Ridgefield Apartments Project"), (ECF No. 168); (2) Arbor Place Apartments in Terrytown, Louisiana from 15 November 2021 to 9 March 2022, (ECF No. 169); (3) Metairie Towers in Metairie, Louisiana from 13 December 2021 to 30 May 2022 (the "Metairie Towers Project"), (ECF No. 170); (4) Belmont Village Apartments in Gretna, Louisiana from 3 November 2021 to 9 March 2022, (ECF No. 171); and (5) Lapalco Apartments in Harvey, Louisiana from 29 November 2021 to 9 March 2022, (ECF No. 172).

69. Brown's Louisiana Asbestos Contractor license number 224418 appears on the Notification of Demolition and Renovation and Asbestos Contaminated Debris Activity Forms (the "Louisiana Notice Form(s)") for the Ridgefield Apartments Project and Metairie Towers Project. (ECF Nos. 168, 170.) The Louisiana Notice

Form for the Ridgefield Apartments Project shows that work began on 13 October 2021 with the form being submitted 8 October 2021, each of which are dates preceding Brown's last day. (ECF No. 168.) The Louisiana Notice Form for the Metairie Towers Project shows that the form was submitted on 11 November 2021, which preceded Brown's last day, but shows that work was scheduled to begin on 13 December 2021. (ECF No. 170.)

70. BluSky Restoration, through its Licensing Specialist Cynthia Nignan ("Nignan"), testified that Brown was the company's qualifier for mold and asbestos in Louisiana before he resigned. (Aff. Cynthia Nignan Supp. BluSky Mot. ¶ 4, ECF No. 141.14 ["Nignan Aff."].) Without providing a date, Nignan states that BluSky Restoration notified Louisiana that Brown was no longer employed by it and that it would provide replacement qualifiers. (Nignan Aff. ¶ 5.) In a 25 March 2022 letter from Louisiana's State Licensing Board for Contractors, BluSky Restoration was informed that it did not have a qualifier for asbestos removal and abatement, or a licensed mold remediation contractor and directed it to designate a qualifying party by 26 May 2022. (Nignan Aff. ¶ 6; Louisiana Ltr., ECF No. 141.4 ["La. Ltr."].) BluSky Restoration, through Nignan, affirms that it had a replacement qualifier before the 26 May 2022 deadline. (*See* Nignan Aff. ¶¶ 6–7.)

3. BluSky Restoration's Bonuses for the 2021 Calendar Year

71. Brown alleges that a bonus of $50,000.00 became due and payable from BluSky Restoration in February 2022, as described in the Employment Agreement. (Brown Countercl. ¶¶ 89–91, 93–94, ECF No. 22 ["Brown Countercl."]; Brown

Dep. 189:15–90:19.) Brown testified that, following his last day at BluSky Restoration, he believed that he was going to receive a $50,000.00 bonus. (Brown Dep. 172:23–25.)

72. The record demonstrates that BluSky Restoration pays certain employees a discretionary bonus, and the Employment Agreement Brown signed states that he "must be employed by BluSky on the day a bonus is paid in order to receive the bonus [I]f you elect to sever your employment with BluSky, there is no vesting in your bonus." (*See* Empl. Agt. 1.)

73. During the negotiations for Brown's continued part-time employment at BluSky Restoration, but following his resignation from the company, a draft agreement was circulated between Cox and Brown. (ECF Nos. 141.10–.11 ("Bonus: Would agree to consider your annual bonus earned and payable. If you come on part-time, the full bonus would be paid some time in February when bonuses are paid company-wide.").) Brown testified, based on the representations during those negotiations, that he believed he was entitled to the bonus described in the Employment Agreement. (Brown Dep. 190:20–93:4.) Brown also testified that, while the Employment Agreement describes an annual bonus calculated by a specific formula, his bonus was "never" paid based on that formula. (Brown Opp'n Aff. ¶¶ 11–12.) Brown affirmed that BluSky Restoration paid him "an alternative performance bonus each year," between 2018 to 2020 and that he was not aware what the conditions were for receiving this bonus.[12] (Brown Opp'n Aff. ¶¶ 13–14.)

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[12] Brown testified that his bonuses ranged from [redacted] to [redacted]. (Brown Dep. 175:3–10.)

74. However, during negotiations with Sasser in July 2021, Brown acknowledged that resigning from BluSky Restoration mid-year would result in forfeiture of his eligibility for a year-end bonus. (ECF No. 141.6 (July 2021 emails between Brown and Figueroa, where Brown wrote "I will be giving up 2021 annual bonus leaving current position with BluSky").) Ultimately, the record demonstrates that BluSky did not pay Brown a bonus for 2021. (Brown Dep. 189:15–93:4.)

III. PROCEDURAL BACKGROUND

75. The Court sets forth here only those portions of the procedural history relevant to its determination of the Motions.

76. BluSky Restoration initiated this action on 22 December 2021 with the filing of its Complaint, (ECF No. 3), and thereafter filed its Amended Complaint as of right on 21 January 2022, (ECF No. 8).

77. Brown filed his Answer to the Amended Complaint on 21 February 2022. (*See* Brown Countercl.) Brown's answer included a Counterclaim and Third-Party Complaint ("Brown's Counterclaims"), alleging three claims for relief against BluSky Restoration and BluSky HoldCo. (*See* Brown Countercl.)

78. BluSky Restoration and BluSky HoldCo jointly answered Brown's Counterclaims on 22 April 2022. (*See* HoldCo Countercl.) In the same pleading, BluSky HoldCo, as third-party defendant, asserted three third-party counterclaims against Brown ("BluSky HoldCo's Counterclaims"). (*See* HoldCo Countercl.)

79. Brown answered BluSky HoldCo's Counterclaims on 23 May 2022. (*See* Answer to HoldCo Countercl.) That same day, BluSky Restoration filed the Second

Amended Complaint, after obtaining leave from the Court to do so. (*See* SAC; Order, ECF No. 65.)

80. On 8 July 2022, Brown, through counsel, sought judgment on the pleadings pursuant to Rule 12(c). (*See* ECF No. 79.) Following full briefing and a hearing on that motion, the Court granted in part the motion as to BluSky Restoration's stand-alone claim for punitive damages and otherwise denied the motion. *See BluSky Restoration Contrs., LLC v. Brown*, 2022 NCBC LEXIS 124 (N.C. Super. Ct. Oct. 20, 2022).

81. The following claims remain pending in this action:

a. The BluSky Companies' claims against Brown for (1) breach of the LP Agreement ("Claim One"), (2) breach of the LLC Agreement ("Claim Two"), and (3) injunctive relief, (*see* SAC ¶¶ 117–42, 153–70; HoldCo Countercl. ¶¶ 109–50);

b. BluSky Restoration's claims against Brown for (1) breach of the 2017 Agreement ("Claim Three") and (2) misappropriation of trade secrets ("Claim Four"), (*see* SAC ¶¶ 106–16, 143–52); and

c. Brown's counterclaims for (1) declaratory judgment against the BluSky Companies, (2) unjust enrichment against BluSky Restoration ("Counterclaim Two"), and (3) violations of the North Carolina Wage and Hour Act against the BluSky Companies ("Counterclaim Three"), (*see* Brown's Countercl. ¶¶ 105–27).

82. Now, the BluSky Companies seek summary judgment in their favor on Brown's Counterclaims Two and Three, (*see* BluSky Mot.), and Brown seeks summary judgment in his favor on Claims One, Two, Three, and Four, as well as affirmative summary judgment on his Counterclaim Two, (*see* Brown Mot.). The Court notes that no party seeks summary judgment on the claims for injunctive relief or declaratory judgment.

83. Following full briefing, the Court held a hearing on the Motions on 15–16 November 2023 (the "Hearing") at which all parties were present and represented through counsel. The Motions are ripe for resolution.

IV. LEGAL STANDARD

84. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citation omitted). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 8 (2018) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)).

85. The moving party bears the burden of showing that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law.

Hensley v. Nat'l Freight Transp., Inc., 193 N.C. App. 561, 563 (2008). The movant may make the required showing by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson*, 352 N.C. at 83 (citations omitted).

86. "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000) (citation omitted). The Court must view the evidence in the light most favorable to the nonmovant. *Dobson*, 352 N.C. at 83 (citation omitted). However, the nonmovant(s)

> may not rest upon the mere allegations or denials of [their] pleading, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If [the nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against [the nonmovant].

N.C.G.S. § 1A-1, Rule 56(e).

87. "For affirmative summary judgment on a party's own claim, the burden is heightened." *Futures Grp. v. Brosnan*, 2023 NCBC LEXIS 7, at **4 (N.C. Super. Ct. Jan. 19, 2023); *see Brooks v. Mount Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The movant "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise

from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985); *accord Kidd v. Early*, 289 N.C. 343, 370 (1976). Consequently, "rarely is it proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

V. ANALYSIS

88. The Court first addresses Brown's Counterclaim Two, as to which both Motions request summary judgment. The Court then considers the remainder of Brown's Motion, addressing Claims One, Two, Three, and Four, concluding with the remainder of BluSky's Motion, addressing Brown's Counterclaim Three against the BluSky Companies.

A. Counterclaim Two: Unjust Enrichment

89. Brown alleges that BluSky Restoration was unjustly enriched by its "continued operations using Brown as their 'qualifying agent' in various states where [it] was actively engaged in work after the date of Brown's resignation[.]" (Brown's Countercl. ¶ 111.) In Brown's view, BluSky Restoration was able to continue (1) remediation and construction projects in states that it did not have a substitute qualifier, and (2) performing on contracts that required it to be appropriately licensed without breaching those contracts. (Brown's Countercl. ¶ 112.)

90. " 'The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation

therefor.' " *Krawiec v. Manly*, 370 N.C. 602, 615 (2018) (quoting *Atlantic C. L. R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95–96 (1966) (citations omitted)). "A claim for unjust enrichment 'is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.' " *Cty. of Wake PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 103, at *28 (N.C. Super. Ct. Sept. 9, 2020) (quoting *Booe v. Shadrick*, 322 N.C. 567, 570 (1988)). "The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties[, then] the contract governs the claim and the law will not imply a contract." *Booe*, 322 N.C. at 570 (citation omitted).

91. To recover on a claim of unjust enrichment, Brown must prove that (1) he conferred a benefit upon BluSky Restoration; (2) the benefit was not "conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances;" (3) the benefit was not gratuitous; (4) the benefit is measurable; and (5) BluSky Restoration consciously accepted the benefit. *Foxx v. Davis*, 289 N.C. App. 473, 485 (2023) (quoting *JPMorgan Chase Bank, N.A. v. Browning*, 230 N.C. App. 537, 541–42 (2013) (cleaned up)).

92. Brown argues that BluSky Restoration performed work while relying on his licenses, without paying him for that use, and that affirmative summary judgment in his favor as to liability is appropriate. (Am. Mem. Supp. Brown Mot. 29, ECF No. 179 ["Br. Supp. Brown Mot."].) However, BluSky Restoration argues in support of its motion that Brown did not confer a measurable benefit on BluSky Restoration because Brown cannot prove "that BluSky actually used his licenses in any of the

states such that it conferred a benefit on BluSky." (BluSky Cos.' Br. Supp. BluSky Mot. 18–19, ECF No. 177 ["Br. Supp. BluSky Mot."].)

93. Brown contends that BluSky Restoration used his asbestos-related licenses in Florida and Louisiana after his resignation from BluSky Restoration, and that it did so without his knowledge until December 2022. (Br. Supp. Brown Mot. 29.) This appears to be the benefit Brown contends was conferred.

94. In *Krawiec v. Manly*, the Supreme Court of North Carolina considered whether plaintiffs sufficiently stated a claim of unjust enrichment at the Rule 12(b)(6) stage. 370 N.C. at 604. There, plaintiffs owned a dance studio and certain defendants were employed by plaintiffs as dance instructors and performers pursuant to a nonimmigrant work visa. *Id.* at 604–05. Plaintiffs contracted with those defendants, referred to as the "dancer defendants," whereby plaintiffs obtained work visas for the dancer defendants "in exchange for each dancer's express promise to work exclusively for plaintiffs as a dance instructor and performer." *Id.* at 605. The dancer defendants, after obtaining their visas, began working as dance instructors for the "Metropolitan defendants," a different business, in violation of their employment agreement with plaintiffs. *Id.* Plaintiffs thereafter brought a claim for unjust enrichment against the Metropolitan defendants. *Id.*

95. Our Supreme Court was asked to consider whether allegations that the Metropolitan defendants "accepted the benefit of employing the dancers without obtaining new visas[,]" was sufficient to allege that plaintiffs conferred a benefit upon the Metropolitan defendants. *Id.* at 615. The Court held that it was not. While the

Metropolitan defendants did not pay for new work visas for the dancer defendants, approval of the dancer defendants' worker visas applied only to the employment outlined in the petition submitted by plaintiffs, and any changes in their employment required the filing of a distinct visa petition. *Id.* Thus, "if the Metropolitan defendants employed the dancer defendants without filing new petitions, no benefit was conferred on the Metropolitan defendants by plaintiffs because their petitions did not authorize the dancers' employment with the Metropolitan defendants." *Id.* at 616.

96. The facts outlined in *Krawiec* are helpful to consider here, where the parties agree that a separate, affirmative act was required of Brown and BluSky Restoration when a change in qualifier status has occurred in a state.

97. Brown testified that he "undertook efforts to notify various state agencies of [his] separation from BluSky Contractors and request[ed] that the agencies remove [his] name from any licenses or qualifier materials affiliated with BluSky" Restoration. (Brown TRO Aff. ¶ 5.) Brown also testified that his efforts included "the submission of a notarized letter to the Florida Department of Business and Professional Regulation on or about December 22, 2021," indicating that he no longer worked at BluSky Restoration and requesting that the agency remove his name from "any licenses or qualifier materials affiliate with BluSky" Restoration. (Brown TRO Aff. ¶ 6, Ex. 1.)

98. Brown's submission of notice to the Florida state agency means that Brown did not authorize BluSky Restoration's use of his license on any further project post-

dating his resignation from the company, and that he expected the State of Florida to disassociate him from BluSky Restoration.[13] This appears to be consistent with Rodriguez's testimony that (1) BluSky Restoration "self-performed regulated asbestos abatement work" on the four Florida projects, and (2) "any asbestos-related work by BluSky employees was performed in conjunction with properly credentialed, independent Florida Asbestos Consultants (*i.e.* industrial hygienists) retained by the owners." (Rodriguez Decl. ¶¶ 5, 9.)

99. As to Louisiana, the evidence of record demonstrates that the BluSky Companies notified the state that Brown was no longer an employee of BluSky Restoration and that it would provide a replacement qualifier.[14] (Nignan Aff. ¶ 5; *see also* La. Ltr.) The record also demonstrates that on 25 March 2022, Louisiana sent BluSky Restoration a letter directing it to appoint replacement mold and asbestos

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[13] The parties each cite to Fla. Stat. § 469.006, which provides that,

> [i]f any qualifying agent ceases to be affiliated with such business organization, the agent shall so inform the department. In addition, if such qualifying agent is the only licensed individual affiliated with the business organization, the business organization shall notify the department of the termination of the qualifying agent and shall have 60 days from the termination of the qualifying agent's affiliation with the business organization in which to employ another qualifying agent.

Fla. Stat. § 469.006(3).

[14] The parties each cite to the Louisiana Administrative Code, which provides in relevant part that,

> [i]f a qualifying party for a particular trade terminates employment . . . , the licensee's license remains valid with the following restrictions. The licensee may continue existing work or bid on new work in the licensed trade classification but may not begin such work until the qualifying party is replaced.

La. Admin. Code tit. 46:XXIX, § 109(D); *see also* La. R.S. § 37:2156.1(D)(1) ("When the qualifying party terminates employment with the licensee, the board shall be notified in writing within thirty days of the disassociation and another qualifying party shall qualify within sixty days.").

qualifiers by 26 May 2022. (Br. Supp. BluSky Mot. 5 (citing Nignan Aff. ¶ 8).) BluSky Restoration appointed a replacement qualifier before the 26 May 2022 deadline. (*See* Nignan Aff. ¶¶ 6–7.)

100. While it appears to be true that BluSky Restoration did not have an alternate asbestos qualifier in Florida or Louisiana after Brown left, (*see* Rodriguez Decl.; Nignan Aff.; La. Ltr.), much like the dancer defendants in *Krawiec* seemingly did not have appropriate work visas when they went to work for the Metropolitan defendants, the evidence demonstrates that Brown and BluSky Restoration each notified the relevant agencies that Brown was no longer affiliated with BluSky Restoration. That BluSky Restoration went forward with projects in those states does not mean that it was unjustly enriched through purported use of Brown's licenses. Rather, it appears that no benefit was conferred by Brown upon BluSky Restoration, as the evidence demonstrates Brown's requested disassociation should have been effective.

101. Brown performed no services and suffered no expenditures that benefitted the BluSky Companies in this context, and as a result, his claim fails because he conferred no benefit on the BluSky Companies. *See Am. Cirs., Inc. v. Bayatronics, LLC*, 2023 NCBC LEXIS 165, at **39–40 (N.C. Super. Ct. Dec. 8, 2023) (deciding that plaintiff did not "voluntarily confer a benefit on" defendants). BluSky Restoration has met its burden by demonstrating that an essential element of Brown's Counterclaim Two fails, and Brown has not come forth with evidence that would create a genuine issue of material fact on the first element of this claim.

102. Therefore, BluSky's Motion is **GRANTED** in part and Brown's Counterclaim Two for unjust enrichment is **DISMISSED**. As a result, Brown's Motion seeking affirmative summary judgment is **DENIED** in part as to Counterclaim Two.

B. Claims One, Two, and Three: The Breach of Contract Claims

103. Brown requests summary judgment in his favor on all three of the BluSky Companies' breach of contract claims.

104. Each of the three agreements at issue in this case have choice of law provisions stating that Delaware law applies. (*See* LP Agt. § 12.6; LLC Agt. § 13.7; 2017 Agt. § 11(a).) Our Supreme Court has held that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262 (1980). Therefore, for the contract claims at issue here, this Court applies North Carolina law for procedural issues and Delaware law as to substantive issues of law.

1. The 2017 Agreement

105. In its Claim Three, BluSky Restoration alleges that the 2017 Agreement's Section 2(a) contains valid and enforceable restrictive covenants between it and Brown. (SAC ¶ 107.) Specifically, it alleges that the 2017 Agreement contains valid and enforceable Nondisclosure and Non-Solicitation provisions. (SAC ¶ 109; 2017 Agt. §§ 2(a)–(b).) BluSky Restoration contends that Brown breached those provisions by (1) downloading and retaining documents after the conclusion of his employment,

and (2) soliciting or otherwise contacting BluSky Restoration employees, including Paul Miller, and encouraging them to leave BluSky Restoration for Sasser. (SAC ¶¶ 112, 114.)

106. Brown's primary argument with respect to the 2017 Agreement is that the BluSky Companies do not have actual damages resulting from any alleged breach. (Br. Supp. Brown Mot. 1–2, 24–25 (citing *LaPoint v. AmerisourceBergen Corp.*, 2007 Del. Ch. LEXIS 131 (Del. Ch. Sept. 4, 2007), *aff'd*, 956 A.2d 642 (Del. 2008)).) Brown argues that there is no evidence of "actual damages arising from any of the restrictive covenants contained in any of the Agreements at issue in this litigation." (Br. Supp. Brown Mot. 25.)

107. "Under North Carolina law, proof of damages is not an element of a claim for breach of contract." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 46, at *127 (N.C. Super. Ct. Aug. 8, 2019) (citing *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792 (2002)). Under Delaware law, however, BluSky Restoration must show "by a preponderance of the evidence" that (1) a contract existed, (2) Brown breached that contract, and (3) the breach of contract led to damages suffered by it. *LaPoint*, 2007 Del. Ch. LEXIS 131, at *30 (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606 (Del. 2003)). To satisfy the third element, BluSky Restoration "must show both the existence of damages provable to a reasonable certainty, and that these damages flowed from [the alleged breach]." *Id.* (citations omitted).

108. At this juncture, the injuries cannot be "speculative or uncertain," and the Court should be able to "make a reasonable estimate as to an amount of damages." *Id.* (citation omitted). A presentation of "credible evidence to support a claim for damages" is sufficient for the breach of contract claim to proceed to trial. *Active Day OH, Inc. v. Wehr*, 2024 Del. Super. LEXIS 479, at *13 (Del. Ch. June 27, 2024). Summary judgment may be denied even despite potential "defects" in a calculation of damages so long as credible evidence is available to support a damages award. *Id.* at *16.

109. Here, Brown contends that BluSky Restoration (1) has suffered no loss of work, (2) does not contend that Brown solicited its customers, subcontractors, vendors, or suppliers, and (3) suffered no loss due to Brown having the CAT Vendor List or Employee Information List because Brown has not used or benefitted from those documents. (Br. Supp. Brown Mot. 7–8, 28.) While Brown acknowledges that BluSky Restoration's expert, Neil Eisgruber ("Eisgruber"), provided a damages estimate for the cost to replace Miller when he left the company for Sasser, Brown appears to contend that the calculation is too speculative or uncertain. (Br. Supp. Brown Mot. 8, 25–26.)

110. BluSky Restoration directs the Court to consider the costs it incurred to replace Miller after he joined Sasser, arguing that its actual damages must at least include the cost of incurring an extra recruitment fee. (BluSky Cos.' Br. Opp'n Brown Mot. 17, ECF No. 199 ["Br. Opp. Brown Mot."].) BluSky Restoration also directs the Court to consider Brown's conduct between July 2021 through his last day at BluSky

Restoration, contending that it incurred actual damages in the form of wages that would not have been paid to Brown had BluSky Restoration known of his ongoing conduct. (Br. Opp. Brown Mot. 18.) Finally, BluSky Restoration notes that nominal damages are permitted under Delaware law, which should allow the claim to progress to trial. (Br. Opp. Brown Mot. 19 (citing *SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 Del. Ch. LEXIS 106, at *3 (Del. Ch. June 16, 2009)).)

111. The record includes Eisgruber's testimony that BluSky Restoration incurred the cost of hiring a project manager after Miller resigned, which resulted in a headhunter or recruiting fee of roughly $[redacted] to $[redacted]. (Eisgruber Dep. 125:21–26:14; *see also* Br. Supp. Brown Mot. 7.) This number is derived from BluSky Restoration's median project manager salary of $93,137.00, multiplied by the fifteen to thirty percent headhunter fee typically charged for recruiting services. (Eisgruber Dep. 126:15–19.) Eisgruber also testified that even when BluSky Restoration does not use headhunter services, the average cost of recruiting a new employee is $[redacted]. (Eisgruber Dep. 134:9–18.) Thus, at the very least there is record evidence that BluSky Restoration incurred *some* damages as a result of Brown's alleged solicitation of Miller because it hired a replacement for Miller either with or without using a headhunter or recruiting service.

112. As to the confidential documents at issue, Brown's expert, Richard Driscoll ("Driscoll"), filed a report in this matter where he opined that the CAT Vendor List and Employee Information List are "not commercially valuable." (Driscoll Rep. 7, 10–12.) Eisgruber's testimony differed, where he opined that (1) it would have taken

Brown between 42 to 120 hours to create the CAT Vendor List, and (2) Brown's misappropriation of the document would result in "opportunity cost" damages, meaning Brown's saved time and cost to develop or recreate this document. (Eisgruber Dep. 61:16–62:8, 62:20–23, 64:16–66:11.) At the time of his deposition, Eisgruber was not aware of damages resulting from the alleged misappropriation of the Employee Information List but estimated unjust enrichment damages in the amount of $106,958.00. (Eisgruber Dep. 116:25–17:11, 121:11–23:6.)

113. Without determining whether BluSky Restoration has proved its breach of contract claim, as that issue is not before the Court at this juncture, the Court agrees that BluSky Restoration may be awarded nominal damages if it ultimately proves that Brown breached the 2017 Agreement. *See Medlink Health Sols., LLC v. JL Kaya, Inc.*, 2024 Del. Super. LEXIS 209, at *14–15 (Del. Super. Ct. Mar. 20, 2024); *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 Del. Ch. LEXIS 55, at *40–41 (Del. Ch. Ct. Apr. 27, 2009) ("Even if compensatory damages cannot be or have not been demonstrated, the breach of a contractual obligation often warrants an award of nominal damages.").

114. It appears that BluSky Restoration has provided at least a minimally reasonable estimate as to an amount of damages for Claim Three, and in any event that it may be entitled to nominal damages. Therefore, the Court **DENIES** in part Brown's Motion as to the request for partial summary judgment on BluSky Restoration's Claim Three for breach of the 2017 Agreement.

2. The LP Agreement and LLC Agreement

115. In Claims One and Two, the BluSky Companies allege that Brown was bound by the LP Agreement and LLC Agreement, and that each agreement contains a Confidentiality, Non-Competition, and Non-Solicitation provision. (SAC ¶¶ 118, 121, 131, 134; HoldCo Countercl. ¶¶ 110, 112, 122, 124.) The BluSky Companies each allege that Brown breached those provisions by (1) soliciting or otherwise contacting BluSky Restoration employees, including Paul Miller, to leave BluSky Restoration for Sasser, (2) becoming "an officer and qualifier for Sasser, a direct competitor of BluSky Restoration, less than one month after his employment with BluSky Restoration concluded," and (3) downloading and otherwise retaining the BluSky Companies' confidential or proprietary information for his and Sasser's benefit. (SAC ¶¶ 123, 125–26, 128, 136–37, 139, 141; HoldCo Countercl. ¶¶ 114, 117, 119, 126–27, 129, 131.)

116. Brown argues, in relevant part, that the restrictive covenants in the LP Agreement and LLC Agreement are overbroad and unenforceable. (Br. Supp. Brown Mot. 15–19.)

117. "Delaware courts review noncompete and nonsolicit agreements subject to Delaware law to ensure that they are (i) reasonable in geographic scope and temporal duration, (ii) advance legitimate economic interests of the party seeking enforcement, and (iii) survive a balancing of the equities." *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 684 n.65 (2024) (citing *FP UC Holdings, LLC v. Hamilton*, 2020 Del. Ch. LEXIS 110, at *14 (Del. Ch. Mar. 27, 2020) (citations omitted)). Delaware courts will

not "mechanically" enforce restrictive covenants. *FP UC Holdings*, 2020 Del. Ch. LEXIS 110, at *14.

> When assessing 'reasonableness,' the court focuses on whether the [covenant] is essential for the protection of the employer's economic interests. The court then balances the employer's interests against the employee's interests. Ultimately, a court of equity will not enforce a [restrictive covenant] if, on balance, to do so would impose an unusual hardship on a former employee.

FP UC Holdings, 2020 Del. Ch. LEXIS 110, at *14 (cleaned up). "The reasonableness of a covenant's scope is not determined by reference to physical distances, but by reference to the area in which a covenantee has an interest the covenants are designed to protect." *Kodiak Bldg. Partners, LLC v. Adams*, 2022 Del. Ch. LEXIS 288, at *21 (Del. Ch. Oct. 6, 2022) (cleaned up). However, "[i]f the employer overreaches by imposing an obviously overbroad geographic restriction on its employee's ability to seek employment after separation, this court will readily decline to enforce the restriction." *FP UC Holdings*, 2020 Del. Ch. LEXIS 110, at *15 (citations omitted).

118. A consideration of various restrictions and what has been considered acceptable or unacceptable is informative here. In *All Pro Maids, Inc. v. Layton*, the covenant at issue was "limited to one year and an area defined by specific zip codes" where the majority of the employer's clients were located. 2004 Del. Ch. LEXIS 116, at *17 (Del. Ch. Aug. 9, 2004), *aff'd* 880 A.2d 1047 (Del. 2005). There, the Chancery Court wrote that "[n]oncompete agreements covering *limited areas* for two or fewer years generally have been held to be reasonable." *Id.* at *18 n.23 (emphasis added)

(citations omitted). In that case, the parties conceded that the covenant was reasonable as to time and geographic scope. *Id.* at *18.

119. In *Norton v. Cameron*, the covenant at issue was for a three-year term and barred the former employee from working "in any manner with any business in competition with or similar to the type of business conducted by" the former employer within a hundred-mile radius of the company's headquarters. 1998 Del. Ch. LEXIS 32, at *6–7 (Del. Ch. March 5, 1998). There, the Chancery Court wrote that "[s]uch a broad, vague and unwieldy restriction given the nature of the industry would work an undue hardship to Defendant[.]" *Id.* at *11. At the permanent injunction stage, the Court restricted the former employee to only a twenty-mile radius and prohibited that person from selling the plaintiff's products to the forty-four customers at issue for three years. *Id.* at *13–16. Thus, the Court did not enforce the covenant as written because to do so would impose unusual hardship, but instead upheld the three-year time restriction by enforcing a limited geographic scope and narrowly outlining the prohibited conduct.

120. With these two cases in mind, it is no surprise that in *Sunder Energy, LLC v. Jackson*, the Chancery Court determined that a two-year noncompete that covered "the entire door-to-door sales industry," regardless of whether plaintiff sold the same or similar products, in at least forty-six states was overbroad and unenforceable. 305 A.3d 723, 755–56 (2023). There, the Court wrote that "[a] covenant that restricts employment in a similar industry for two years might be reasonable if it only applies within a single town or county, and vice versa." *Id.* at 753. Ultimately, the restriction

at issue was determined to be overbroad and the Court declined to enforce it because it was "unreasonable on its face[.]" *Id.* at 758.

121. Here, the Non-Competition and Non-Solicitation provisions in the LP Agreement and LLC Agreement are unenforceable because they (1) are not reasonable in geographic scope and temporal duration, and (2) do not advance the legitimate economic interests of the BluSky Companies.

i. The Non-Solicitation Provisions

122. Here, the LP Agreement and LLC Agreement's Non-Solicitation provisions provide that, for two years after the conclusion of Brown's employment, he shall not: (1) directly or indirectly induce or attempt to induce any employee, officer, or independent contractor of the BluSky Companies to leave their employment; (2) hire or "seek *any* business affiliation" with any employee, officer, or independent contractor of the BluSky Companies within one year after that person ceases to be an employee, officer, or independent contractor; and (3) induce or attempt to induce any "customer, supplier, licensee or other business relation" of the BluSky Companies to "cease doing business" with the companies or reduce the business of the companies, "or in any way interfere with the relationship between any such customer, supplier, licensee or business relation" and the BluSky Companies. (LP Agt. § 12.10(b); LLC Agt. § 13.17(b) (emphasis added).)

123. The Non-Solicitation provisions prohibit this conduct within the United States of America and any location where the BluSky Companies engage "in the Business *or actively plans* to engage in the Business as of the date of the challenged

activity[.]" (LP Agt. § 12.10(c); LLC Agt. § 13.17(c) (emphasis added).) The "Business" means anyone providing project management services relating to restoration, renovation, environmental, and roofing to commercial and multifamily properties. (LP Agt. § 12.10(c); LLC Agt. § 13.17(c).)

124. As written, the Non-Solicitation provisions in the LP Agreement and LLC Agreement would prohibit Brown from contacting any "business relation" of the BluSky Companies that would reduce the business of the BluSky Companies or in any way "interfere" with their relationship. In other words, for a two-year period after employment, Brown is prohibited from contacting BluSky Restoration's business contacts that may be engaged in similar restoration services, whether known to Brown or not, anywhere in the United States or any country that the BluSky Companies may be planning to engage in business sometime in the future.

125. The geographic scope of the Non-Solicitation provisions are facially unreasonable because they arguably cover the entire globe. BluSky Restoration's "business is not geographically limited[,]" and its business and services are advertised nationally. (*See* Bisping Aff. ¶¶ 19, 23, 25, 31.) Further, the Non-Solicitation provisions wholly fail to advance the BluSky Companies' *legitimate* economic interests. While the BluSky Companies argue that preserving "customer relationships" is a legitimate economic interest, (Br. Opp. Brown Mot. 13–14), the provisions at issue here have gone too far. The BluSky Companies certainly have an interest in protecting customer and other legitimate business relationships, but they

do not have an interest in protecting prospective business relationships that Brown has no knowledge of.

126. Therefore, the Non-Solicitation provision in both the LP Agreement and LLC Agreement is overbroad and unenforceable because the geographic scope of the provisions is unreasonable, particularly in light of the two-year time restriction.

ii. The Non-Competition Provisions

127. The Non-Competition provisions in the LP Agreement and LLC Agreement restrict Brown for two-years post-employment, within the same geographic scope, and prohibit Brown from: (1) owning an interest in, managing, controlling, or participating in any business that engages in "the Business," as defined above; and (2) in a competitive capacity,[15] consulting, rendering services for, serving as an agent or representative for, or financing any business engaged in "the Business," as defined. (LP Agt. § 12.10(c); LLC Agt. § 13.17(c).)

128. As discussed, the geographic restrictions here, when coupled with the temporal restrictions, are facially overbroad. The Non-Competition provisions do not serve to protect the legitimate locations where the BluSky Companies conduct business. Rather, the covenants go beyond to include locations where the BluSky Companies actively plan to, but do not currently, conduct business. As Delaware courts do, this Court will decline to enforce such a restriction. *See FP UC Holdings*, 2020 Del. Ch. LEXIS 110, at *15 n.42 (citing in part *Norton*, 1998 Del. Ch. LEXIS 32).

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[15] The Court notes that neither the LP Agreement nor the LLC Agreement define what type of conduct is included in the phrase "in a competitive capacity[,]" and thus it is unclear to the Court how broadly or narrowly to interpret that phrase.

129. Additionally, as Brown argues, the Non-Competition provisions in the LP Agreement and the LLC Agreement would prohibit Brown from working anywhere in the restoration industry for two years after the conclusion of his employment in at least the forty states where BluSky Restoration does business. If read as broadly as the Non-Competition provisions could be, Brown is prohibited from providing financing for project management services relating to restoration, renovation, environmental, and roofing projects anywhere in the United States and perhaps also abroad. The Non-Competition provisions, therefore, could be read as prohibiting Brown from financing renovations on his own home, if that could be considered financing "in a competitive capacity." Such a restriction does not serve a legitimate economic interest here.

130. Ultimately, as the moving party, Brown has met his burden of demonstrating that the restrictive covenants at issue here are not appropriately tailored to protect the BluSky Companies' legitimate interests. Rather, the restrictions are overly broad and the Court "will not enforce a covenant that is more restrictive than the compan[ies'] legitimate interests justify[.]" *Sunder Energy*, 305 A.3d at 758 (quoting *Norton*, 1998 Del. Ch. LEXIS 32, at *9). And, "[w]hen a restrictive covenant is overbroad, a Delaware court will resist 'blue-penciling' the provision to make it reasonable." *Id.* at 753. This Court will do the same.

131. Therefore, Brown's Motion is **GRANTED** in part as to Claim One and Claim Two for breach of the LP Agreement and LLC Agreement. As a result, those claims are hereby **DISMISSED**.

C. **Claim Four: Misappropriation of Trade Secrets**

132. Next, Brown seeks summary judgment on BluSky Restoration's Claim Four for misappropriation of trade secrets under the North Carolina Trade Secret Protection Act, N.C.G.S. § 66-152 *et seq.* ("TSPA"). (*See* Brown Mot. 2.)

133. "A threshold question in any action involving allegations of misappropriation of trade secrets is whether the information in question constitutes a trade secret under the [TSPA]." *Koch Measurement Devices, Inc. v. Armke*, 2015 NCBC LEXIS 45, at *10 (N.C. Super. Ct. May 1, 2015) (citation omitted).

134. The TSPA defines a trade secret as:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3). Here, BluSky Restoration contends that its CAT Vendor List and Employee Information List constitute trade secrets under North Carolina law.

135. In response, Brown first argues that the CAT Vendor List does not derive any independent value from not being generally known. (Br. Supp. Brown Mot. 21–22.) BluSky Restoration contends that compilations of this type are entitled to protection if it would encounter "difficulty assembling public components into a secret compilation." (Br. Opp. Brown Mot. 22 (citing *SCR-Tech LLC v. Evonik Energy*

Servs., LLC, 2011 NCBC LEXIS 27, at **41–42 (N.C. Super. Ct. July 22, 2011)).) BluSky Restoration argues that the CAT Vendor List meets this requirement. (*See* Br. Opp. Brown Mot. 23.)

136. This Court has held that, "compilations comprised solely of publicly available information are generally not recognized as trade secrets. A compilation of publicly available information may, however, receive trade secret protection where the claimant encountered some difficulty in assembling each of the public components." *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *26 (N.C. Super. Ct. Apr. 23, 2015) (internal citations omitted). This inquiry "must be as to specific facts" which varies on a case-by-case basis. *Id.* at *27.

137. Here, the CAT Vendor List is somewhat similar in form to the customer lists that our courts have determined may constitute a trade secret in the right circumstances. *See Found. Bldg. Materials, LLC v. Conking & Calabrese, Co.*, 2023 NCBC LEXIS 87, at **23–24 (N.C. Super. Ct. July 7, 2023) (collecting comparable cases). Rather than compiling customer information, BluSky Restoration is compiling its specific vendor information.

138. The evidence of record is that the CAT Vendor List is a collection of national restoration vendors, containing the contact information for individuals in the companies, including direct lines and cellphone numbers rather than a publicly available general phone line. (*See* Eisgruber Dep. 50:7–51:14; Erekson Dep. 116:23–17:1.)

139. BluSky Restoration's Chief Operations Officer, Mike Erekson ("Erekson"), testified that the CAT Vendor List has been revised over several years and would take years to recreate. (Erekson Dep. 115:2–16:4.) In BluSky Restoration's view, the CAT Vendor List is a compilation of "the best vendors[.]" (Br. Opp. Brown Mot. 23 (citing Erekson Dep. 115:2–20:4).) While Brown's expert, Driscoll, opined that the list is not commercially valuable, this creates a factual issue for the jury at worst.

140. The Court notes that the facts of this case are distinct from those present in *Building Center, Inc. v. Carter Lumber*, where the customer lists at issue consisted only of the names, phone numbers, and email addresses of customers, which was information largely already publicly available. 2017 NCBC LEXIS 85, at *19–20 (N.C. Super. Ct. Sept. 21, 2017). The CAT Vendor List is not a list of all vendors BluSky Restoration uses, but rather appears to comprise only the cultivated and dependable few. The list is organized by service needed, like asbestos testing, and then denotes the best contact person, phone number, email address, and what the vendor's specialty is. (*See* CAT List 1.) By way of further example, the CAT Vendor List has four storage container vendors listed, one of which only provides services in Arizona, California, and Colorado, and one that also provides dumpsters, porta-potties, and portable offices. (CAT List 1.) This kind of collection has potential commercial value from not being generally known, as BluSky Restoration has a direct personal contact to, in its view, the best storage container or portable office supplier in the event of a disaster that requires a prompt response.

141. Therefore, BluSky Restoration has demonstrated that the CAT Vendor List contains more than just publicly available information. As a result, it has met its burden of demonstrating that a genuine issue of material fact remains for a jury regarding the CAT Vendor List's commercial value.

142. Next, Brown contends that BluSky Restoration cannot demonstrate that its alleged trade secrets were subject to reasonable measures to maintain their secrecy. (*See* Br. Supp. Brown Mot. 22–24.)

143. BluSky Restoration has provided evidence that it requires "each employee to password-protect their devices, return all company devices upon departure, and sign a separation letter certifying they have returned all trade secrets and confidential information." (Br. Opp. Brown Mot. 24–25 (citing in part Cleveland Aff. ¶¶ 5–22; Erekson Dep. 46:18–47:18).) Erekson testified that the only individuals at BluSky Restoration who have unrestricted access to the company's SharePoint are the "CEO, CFO . . . and CIO." (Erekson Dep. 48:9–19.) Further, the evidence demonstrates that Brown and Miller each certified that they returned all trade secret information in their respective separation letters. (Cleveland Aff. Exs. E–F; *see also* Miller Dep. 52:7–16; Separation Ltr.)

144. BluSky Restoration also has an employee handbook discussing the importance of maintaining secrecy, and argues that "its practice is to have each new hire review and acknowledge the handbook and existing employees do the same each year." (Br. Opp. Brown Mot. 25 (citing Cleveland Aff. ¶¶ 8–12 (concerning the practice of updating the employee handbook and requiring employees to review and

sign an acknowledgment)); *see also* Cleveland Aff. Ex. C (providing the BluSky Restoration handbooks for 2019, 2020, and 2021).) The evidence also demonstrates that Brown was aware of the employee handbook, as he emailed the 2020 employee handbook for dissemination, writing that "everyone needs to sign/date and return the employee handbook signature page[.]" (ECF Nos. 197.20–.21.) Brown's counsel questions this policy by noting that no handbook acknowledgement appears in the record for Brown and Miller. (Br. Supp. Brown Mot. 6; Reply Supp. Brown Mot. 14–15, ECF No. 212.)

145. Finally, BluSky Restoration's practices include having higher-ranking employees sign restrictive covenants and confidentiality agreements. (Br. Opp. Brown Mot. 26; *see also* Cox 30(b)(6) Dep. 142:23–43:25, 144:14–50:4; 2017 Agt. § 2(a)(ii) (setting out a confidentiality provision in Brown's employment agreement with BluSky Restoration, effective 1 October 2017).)

146. Here, Brown has not demonstrated that BluSky Restoration's efforts to protect its trade secrets were unreasonable as a matter of law. Rather, the measures are at least sufficient to create a genuine issue of material fact for a jury on this issue. *See, e.g., Roundpoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at **36–38 (N.C. Super. Ct. Feb. 18, 2016) (holding confidentiality provision in handbook, password-protected computer systems, and employee confidentiality agreements created issue of material fact as to reasonable measures even where defendants "produced evidence that could lead a jury to doubt the adequacy" of plaintiff's policies); *Encompass Servs., PLLC v. Maser Consulting P.A.*, 2021 NCBC LEXIS 59, at **32 (N.C. Super. Ct. June

28, 2021) (determining that, while the jury could be troubled by plaintiff's failures to "implement or enforce" confidentiality policies, the claim nevertheless survived). BluSky Restoration's efforts may have been suboptimal, but they are adequate to create a genuine issue of fact such that a jury may determine reasonableness. *See SiteLink Software, LLC v. Red Nova Labs, Inc.*, 2018 NCBC LEXIS 90, at *31 (N.C. Super. Ct. Aug. 20, 2018).

147. Therefore, the Court **DENIES** Brown's Motion as to BluSky Restoration's Claim Four for violations of the TSPA.

D. Counterclaim Three: Violation of the North Carolina Wage and Hour Act

148. The BluSky Companies request summary judgment in their favor on Brown's Counterclaim Three for violations of the North Carolina Wage and Hour Act, N.C.G.S. § 95-25.1 *et seq.* (the "WHA"). (BluSky Mot. 2.)

149. The WHA provides, in relevant part, that

> [e]mployees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by trackable mail if requested by the employee in writing. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with [N.C.]G.S. [§]95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C.G.S. § 95-25.7. Under the WHA, "a bonus will be subject to forfeiture only if the employer 'has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned.' " *Mancinelli v. Momentum Research, Inc.*, 2012

NCBC LEXIS 4, at **22–23 (N.C. Super. Ct. Jan 12, 2012) (quoting *Narron v Hardee's Food Sys., Inc.*, 75 N.C. App. 570, 583 (1985)). "A notification that causes forfeiture of bonus is not sufficient if it does not specify the conditions for loss or forfeiture." *Id.* at **23 (cleaned up).

150. Here, the BluSky Companies argue that Brown's purported bonus for 2021 was not earned and owing because he voluntarily resigned before the day the bonus was paid, an express condition of receiving a bonus as set forth in the Employment Agreement. (Br. Supp. BluSky Mot. 26–27; *see* Empl. Agt.)

151. Brown argues that the Employment Agreement does not provide the basis for the bonus that he contends he is entitled to. (Brown's Mem. Opp'n BluSky Mot. 16, ECF No. 196 ["Br. Opp. BluSky Mot."].) Rather, Brown argues that BluSky Restoration "never paid Brown any bonus based upon th[e] formula" set forth in the Employment Agreement. (Br. Opp. BluSky Mot. 17.) Instead, Brown contends that the BluSky Companies paid him an alternative bonus each year without advising him of the conditions for receiving or forfeiting that bonus. (Br. Opp. BluSky Mot. 17.)

152. While Brown contends that the Employment Agreement does not provide the basis for Brown's annual bonus, the Court is unable to find any evidence of another agreement, be it oral or written, that supports a contention that the BluSky Companies owe Brown a "recurring annual bonus of $50,000.00" for 2021. (Br. Opp. BluSky Mot. 17.) In support of his contention, Brown cites to two pieces of evidence other than to the Employment Agreement. (*See* Br. Opp. BluSky Mot. 16–17 (citing Brown Opp'n Aff; Cox 30(b)(6) Dep.).)

153. First, Brown cites his own testimony that the formula described in the Employment Agreement was not how BluSky Restoration actually paid his bonus. (Brown Opp'n Aff. ¶¶ 11–12.) Rather, he testifies that his annual bonus was "an alternative performance bonus" and that BluSky Restoration never informed him of the conditions for receiving this bonus. (Brown Opp'n Aff. ¶¶ 13–14.) This testimony does not negate that the Employment Agreement provides the right to Brown's annual bonus, particularly because Brown does not contend that he received *two* bonuses each year that arose out of different policies or practices.

154. Second, Brown cites to Cox's deposition testimony. (*See* Cox 30(b)(6) Dep.) In the testimony cited, Cox is discussing the Employment Agreement in relation to BluSky Restoration's negotiations with Brown for continued part-time employment. In particular, Brown's counsel reads a portion of an email sent by Cox to Brown, describing that the bonus provided for *in the Employment Agreement*, which would be $50,000.00 to be paid in February 2022, would be considered earned and payable if Brown continued to work for BluSky Restoration on a part time basis as negotiated. (Cox 30(b)(6) Dep. 96:3–20; *see* Negot'n Email.)

155. Both pieces of evidence cited by Brown tend to support the BluSky Companies' contention that the Employment Agreement provided for the annual bonus that Brown contends he is entitled to.

156. The Employment Agreement clearly states that Brown "must be employed by BluSky on the day a bonus is paid in order to receive the bonus." (Empl. Agt. 1.)

It also provides, "if you elect to sever your employment with BluSky, there is no vesting in your bonus." (Empl. Agt. 1.)

157. It is undisputed that Brown elected to sever his employment with BluSky Restoration on 19 November 2021. It is also undisputed that Brown was not employed by BluSky Restoration in February 2022 when bonuses were paid by the company. Finally, it is undisputed that Brown did not reach an agreement with BluSky Restoration for continued part-time employment, as negotiations ceased on 6 December 2021. Thus, the parties never agreed to the terms of part-time employment such that the terms of the Employment Agreement would be modified by Cox's email to Brown on 20 November 2021. (*See* ECF Nos. 141.10–.11.)

158. The BluSky Companies have successfully demonstrated that a crucial element of Brown's Counterclaim Three fails because Brown was notified of the conditions of forfeiture of his bonus: electing to sever employment with BluSky Restoration because the employee must be employed by BluSky Restoration on the day the bonus is paid in order to receive the bonus. Brown has come forth with no evidence to rebut this, or to demonstrate that a genuine issue of material fact remains for a jury on this issue. Therefore, the Court **GRANTS** in part BluSky's Motion and Counterclaim Three is hereby **DISMISSED**.

VI. CONCLUSION

159. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motions as follows:

a. BluSky's Motion is **GRANTED** in part as to Brown's Counterclaims Two and Three, and those claims are **DISMISSED**;

b. Brown's Motion is **GRANTED** in part as to the BluSky Companies' Claims One and Two for breach of the LP Agreement and LLC Agreement, and those claims are **DISMISSED**; and

c. Except as expressly granted, the Motions are otherwise **DENIED**.

160. As a result of this ruling, BluSky Restoration's Claim Three for breach of the 2017 Agreement and Claim Four for misappropriation of trade secrets will proceed to trial. Also remaining for determination at trial are the BluSky Companies' claims for injunctive relief and Brown's counterclaim for declaratory judgment.

IT IS SO ORDERED, this the 7th day of August, 2024.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases